

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **✓**

Date: **23rd May 2022** Signature: _____

DATE: 23RD MAY 2022

(1) CASE NO: 27208/2020

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED

Applicant

and

AGILE CAPITAL HOLDINGS (PTY) LIMITED

Respondent

(2) CASE NO: 27214/2020

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED

Applicant

and

ANVIL PROPERTY SMITH (PTY) LIMITED

Respondent

(3) CASE NO: 27204/2020

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED

Applicant

and

CMS MANAGEMENT CC

Respondent

(4) CASE NO: 27213/2020

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED Applicant

and

CORNERSTONE CASH INVESTMENTS (PTY) LIMITED Respondent**(5) CASE NO: 27205/2020**

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED Applicant

and

I CAPITAL RISK SERVICES (PTY) LIMITED Respondent**(6) CASE NO: 27210/2020**

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED Applicant

and

LEGERITY (PTY) LIMITED Respondent**(7) CASE NO: 27211/2020**

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED Applicant

and

LITTLE SWIFT INVESTMENTS (PTY) LIMITED Respondent**(8) CASE NO: 27209/2020**

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED Applicant

and

**RIPARIAN COMMODITIES (PTY) LIMITED t/a
BARAK FLUID MANAGEMENT** Respondent**(9) CASE NO: 27215/2020**

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED Applicant

and

SD PROPERTIES JHB (PTY) LIMITED Respondent

(10) CASE NO: 3024/2021

In the matter between:

68 MELVILLE ROAD PROPERTIES (PTY) LIMITED

Applicant

and

PHK TRUST

Respondent

Coram: Adams J

Heard on: 24 November 2021 – the ‘virtual hearing’ of these matters was conducted as a videoconference on the *Microsoft Teams*.

Delivered: 23 May 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 23 May 2022.

Summary: Opposed applications – for monetary judgments –

Interpretation of contract – purchase and sale agreement relating to Sectional Title Scheme units – purchase price – estimated and final adjusted purchase price – final adjusted purchase price to be determined by ‘the Quantity Surveyor’ – meaning –

Disputes of fact in motion proceedings – judgments granted in favour of the applicant.

ORDER

(1) Under Case number: 27208/2020, judgment is granted in favour of the applicant against the respondent for: -

- (a) Payment of the sum of R112 600.70 (excluding VAT);
- (b) Payment of interest on R112 600.70 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;

- (c) Costs of suit on the scale as between attorney and client.
- (2) Under Case number: 27214/2020, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R885 270.36 (excluding VAT);
 - (b) Payment of interest on R885 270.36 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (3) Under Case number: 27204/2020, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R5 958 179,08 (excluding VAT);
 - (b) Payment of interest on R5 958 179,08 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (4) Under Case number: 27213/2020, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R1 433 661.79 (excluding VAT);
 - (b) Payment of interest on R1 433 661.79 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (5) Under Case number: 27205/2020, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R1 279 987.94 (excluding VAT);
 - (b) Payment of interest on R1 279 987.94 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.

- (6) Under Case number: 27210/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R721 030.76 (excluding VAT);
 - (b) Payment of interest on R721 030.76 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (7) Under Case number: 27211/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R2 038 166.93 (excluding VAT);
 - (b) Payment of interest on R2 038 166.93 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (8) Under Case number: 27209/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R3 295 296.30 (excluding VAT);
 - (b) Payment of interest on R3 295 296.30 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (9) Under Case number: 27215/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R4 809 655.04 (excluding VAT);
 - (b) Payment of interest on R4 809 655.04 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (10) Under Case number: 3024/2021, judgment is granted in favour of the applicant against the respondent for: -

- (a) Payment of the sum of R1 802 636.87 (excluding VAT);
 - (b) Payment of interest on R1 802 636.87 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
-

JUDGMENT

Adams J:

[1]. On 24 November 2021 ten opposed applications by the applicant, 68 Melville Road Properties (Pty) Limited ('68 Melville Road Properties'), against ten different respondents, came before me in the Commercial Court of this Division. In addition to the fact that 68 Melville Road Properties is the applicant in all of these applications, the further commonality between these opposed motions is that the factual matrices underlying the applicant's causes of action are almost identical in that they are all based on 'Sectional Title – Purchase and Sale Agreements' relating to units in a Sectional Title Development known as Illovo Point in Illovo. The respondents also raise the exact same defences in opposition to the claims by the applicant against them.

[2]. It is accordingly convenient to deal with all of these matters in one judgment and the way in which that will be done is to discuss one particular application – the matter of Agile Capital Holdings (Pty) Limited ('Agile Capital Holdings' or 'Agile') under case number 27208/2020 – and to extend and project the findings in that matter to the other nine matters and the orders therein. In this judgment therefore a reference to Agile Capital Holdings can and should, for the most part, be read as a reference to any of the nine other respondents. The obvious difference between the matters relates to the specific units which had been purchased by the respondents and the divergent purchase prices paid by the individual respondents for the units purchased, which depends mainly on the size and square meterage of the unit or units purchase by an individual respondent. This will become clearer later on in the judgment especially in the context of the 'participation quota', which is a term central to the agreements

between the parties and which, in a nutshell, denotes a respondent's *pro rata* share in the Sectional Title development, which axiomatically brings with it *pro rata* contributions to the overall costs.

[3]. On 3 March 2017 the applicant and Agile Capital Holdings entered into a written 'Purchase and Sale agreement' for the sale of Sectional Title: Illovo Point Unit – section 1203 (recorded as section 19c in the agreement), measuring 180 m², and seven parking bays, for the nett purchase price of R4 538 400 (excluding VAT). All of the respondents signed similar agreements during 2016 and 2017. So, for example, Anvil Property Smith (Pty) Limited ('Anvil Property Smith') concluded its agreement on 21 October 2016 in respect of section 13, including fourteen parking bays, for the nett purchase price of R8 661 350.

[4]. At issue in the opposed applications before me is a clause in the Purchase and Sale Agreements which relates to the 'Adjustment of the Purchase Price' and the interpretation of the said clause, as well as its implementation in the circumstances of the matters. It may be apposite to cite the said clause in full. It reads as follows:

'4 ADJUSTMENT TO THE PURCHASE PRICE

- 4.1 It is recorded that the purchase price of the property shall, after registration of transfer, be adjusted to the amount equal to the final participation quota allocated to the section (as recorded on the sectional plan of the Scheme once approved of by the Surveyor General) multiplied by the Total Base Development Cost after it has been finalised in terms of paragraph 4.3 hereof.
- 4.2 The amount referred to in paragraph 1.5 of the Contract of Sale is therefore the actual purchase price of the property, which has been calculated by multiplying the anticipated Total Base Development Cost (as referred to in Annexure "E" hereto) by the anticipated participation quota of the Section (as referred to in Annexure "PQ" hereto).
- 4.3 Once registration of transfer has occurred and once the Total Base Development Cost has been finalised by the Quantity Surveyor (which shall occur as soon as possible after the Scheme is complete) the purchase price shall be adjusted to the amount as finally calculated in accordance with the aforesaid formula and where the purchase price of the Property is less than the amount reflected in Clause 1.5,

the balance owing to the Purchaser shall be refunded through the Purchaser's shareholding in the Seller's entity.

- 4.4 If there is any dispute as to what the Total Base Development Cost of the property is, the decision of the Quantity Surveyor (acting in his capacity as an expert and not an arbiter) shall be final and binding on the parties.
- 4.5 Notwithstanding the aforesaid, it is recorded that this agreement shall be subject to the condition that, should the anticipated costs of constructing the Scheme prove to be in excess of R26 000.00 (twenty-six thousand rand) excluding Value Added Tax and brokers commission per sectional title square metre, then in that event the provisions of the Shareholders' Agreement concluded between the Purchaser and other shareholders in the Scheme shall apply relating to the possible increase in the contribution to certain loan accounts being required from each shareholder, and/or the redesign of the Scheme to reduce the construction costs or to delay the construction of the Scheme or to proceed on some other basis,'.

[5]. In these applications the applicant claims from all of the respondents the amounts payable in terms of the above clause 4.1, which represent the difference between the purchase prices based on the anticipated total base development cost and the actual final total base development cost. The case of the applicant is therefore that the total base development cost was decided by the Quantity Surveyor and, applying to that calculation the final participation quota of each respondent, the nett result is that the amounts claimed in these applications are due by the respondents to the applicant.

[6]. The issues in these applications are to be decided against the factual background as set out in the paragraphs which follow. These facts are by and large common cause and in certain instances the applicant's material allegations are not seriously challenged by the respondents.

[7]. As already indicated, the applicant is the developer of the mixed-use commercial property Sectional Title Scheme known as Illovo Point. Agile Capital Holdings bought the unit, section 1203, in the Scheme in terms of and pursuant to the sale agreement referred to supra. It is the case of the applicant there does not seem to be any serious dispute that the Scheme reached practical completion on 31 August 2020. The Scheme has been completed on or about that date, save for some snags, and the final cost of doing so has been determined. Prior to that,

on or about 29 August 2018, the Land Surveyor had confirmed the final participation quota allocated to section 1203 purchased by Agile Capital Holdings as 1.064%, as well as the final participation quota allocated to all of the other sections sold to the other respondents. And on 6 June 2019 the section had been transferred into the name of Agile Capital Holdings.

[8]. On 14 September 2020 the Quantity Surveyor, DHP Quantity Surveyors, determined and issued the 'Final Base Development Cost' and gave details of all of the individual items and the adjusted sums. They determined the 'Final Base Development Cost' in an amount of R437 219 000. Based on that final cost determination and the participation quota allocated to section 1203, the total actual purchase price payable by Agile Capital Holdings to the applicant is the sum of R4 651 000.70. By then Agile had paid the total amount of R4 538 400 in respect of the purchase price, leaving a balance of R112 600.70 payable by Agile, in its capacity, as purchaser, to the applicant, as seller of the unit in question. This amount of R112 600.70 is the amount claimed by the applicant from Agile in this application.

The Defences raised by Agile Capital Holdings and the other Respondents

[9]. In addition to opposing the application on the 'merits', Agile raised a couple of legal points *in limine*, the first of which relates to the alleged lack of authority on the part of the deponent to the applicant's founding affidavit, who is a director of the applicant. Agile contends, as do all the other respondents, that the said deponent, Mr Poole, has not been authorised by the applicant to depose to the founding affidavit and the applicant's attorneys did not have the authority of the applicant to have instituted the application. Additionally, Agile denies that Mr Poole has the requisite personal knowledge to depose to the founding affidavit on behalf of the applicant.

[10]. Mr Mahon, who appeared in all the applications on behalf of the applicant together with Mr Brewer, submitted that a deponent to an affidavit need not be authorised to depose thereto. Rather, it is the institution and prosecution of the application by the applicant's attorneys that must be authorised. Accordingly, so the argument on behalf of the applicant continued, to the extent that Agile alleges

that Mr Poole was not authorised to depose to the founding affidavit, this contention is without merit.

[11]. It was furthermore submitted on behalf of the applicant that, if the respondents dispute the applicant's attorney's authority to institute and/or prosecute the application, the respondent's remedy lies under Uniform Rule of Court 7, of which rule Agile in fact availed itself in that on 9 October 2020, Agile delivered a Rule 7 notice. In that notice Agile pleaded that, based on the provisions of a shareholders' agreement between the shareholders of the applicant, Agile being one of them, as were all of the other respondents, the written consent of each of the shareholders were required before any legal action could be instituted other than for the uncontested collection of debts.

[12]. The applicant's response to this contention by Agile and the other respondents is simply that the particular clause in the shareholders' agreement, properly interpreted, permits the applicant to institute and prosecute the applications without obtaining all the shareholders' written consent. This is so because in these applications debts are claimed, which in fact and in truth should not and therefore are not contested. The sale agreement, so the contention goes, sets out the basis of the calculation of the purchase price of the section that Agile purchased from the applicant, which means that Agile agreed to and is contractually bound by that calculation and therefore there can be no dispute about Agile's indebtedness to the applicant.

[13]. Therefore, so the applicant contends, there is no merit in this ground of opposition to the applicant's claim. I find myself in agreement with this contention. In any event, it would be an impractical and unbusinesslike interpretation of the relevant clause to suggest that, if a debt is to be collected from a shareholder, that shareholder's consent is required before the applicant's board of directors could commence legal proceedings in order to collect from a shareholder a debt owed by that particular shareholder.

[14]. As regards the allegation by Agile that Mr Poole and the applicant's attorneys were not authorised to institute the present legal proceedings, the applicant attached to their rule 7 reply the minutes of a board meeting dated

3 September 2020, at which meeting it was resolved that legal action would be proceeded with against 'defaulting shareholders to recover the funds due to [the applicant]'. On the basis of this resolution, a power of attorney was granted by the applicant in favour of its present attorneys of record to proceed with the issue of the present applications.

[15]. That, in my view, is the end of the point *in limine* by the respondents relating to lack of authority. The so-called authority defence is without merit.

[16]. The second point raised by Agile and the other respondents is that the 'Total Base Development Cost' has not been finally (or properly) determined because the final determination was not made by the quantity surveyor that was named in the sale agreement. Also, so the respondents contend, there is no confirmatory affidavit by the quantity surveyor that prepared the final determination and certain credit items were not included in the determination to reduce the total costs.

[17]. As regards the identity of the Quantity Surveyor, it is the case of the respondents that in the Purchase and Sale Agreement the parties had expressly agreed to a specific Quantity Surveyor, namely FWJK Johannesburg (Pty) Ltd ('FWJK Quantity Surveyors'), being the firm mentioned in the said agreement under the heading 'Name of Quantity Surveyor nominated by [the applicant]'. Moreover, so the respondents allege, in the definitions section of the agreement 'Quantity Surveyor' means FWJK Johannesburg (Pty) Ltd.

[18]. Therefore, so the argument on behalf of the respondents continued, because the 'Total Base Development Cost' was prepared by a different firm of quantity surveyor, being D'Arcy Hedding Partnership Quantity Surveyors ('DHP Quantity Surveyors'), the determination of the cost did not amount to a determination by the agreed quantity surveyor and therefore was not a determination as envisaged by the agreement. The determination by DHP Quantity Surveyors therefore has no legal effect.

[19]. A proper interpretation of the agreement, in my view, does not support the foregoing contention by the respondents. The sale agreement simply provided that the quantity surveyor was nominated by the applicant. Clearly, however one

views the agreement, the identity of the quantity surveyor was never material. It would have been within the contemplation of the parties that the choice of Quantity Surveyor resided solely within the discretion of the applicant.

[20]. In that regard, Mr Mahon drew my attention to the decision in *Van Diggelen v De Bruin and Another*¹, in which the Court commented on whether there should be performance *in forma specifica* or whether performance *per aequipollens* will suffice. The Court held that from the surrounding circumstances it must be gathered what the parties contemplated. It must take into consideration everything which can give a clue to the intention of the parties. It must seek to find out what the parties would have wished if their minds had been specifically directed to the question whether the condition was to be fulfilled 'in forma specifica' or by an equivalent act. Importantly, Claassen J held as follows:

'(3) The Court will in cases of doubt be more likely to find in favour of performance "per aequipollens" if the manner of performing is not material or also where performance "in forma specifica" is impossible through no serious fault on the part of the promisor.'

[21]. I am in agreement with the *ratio decidendi* in *Van Diggelen*. Applying these principles *in casu*, I have very little doubt that the parties to the sale agreement would have had in mind that, relative to the determination of the final cost by the Quantity Surveyor, an equivalent performance *per aequipollens* would suffice. It is inconceivable that the parties would have contemplated a determination of the cost only by the named Quantity Surveyor. This is borne out by the wording of the relevant provisions, which, as I have already indicated, seems to suggest that the applicant could replace at will the Quantity Surveyors. The point is that the determination by DHP Quantity Surveyors is an equivalent act to that mentioned in the contract and, in any event, is of such a nature that it could and did in fact make no material difference to the respondents.

[22]. As was said in *Van Diggelen*, '[t]he Court's paramount concern is always, within the framework of the law, to do justice between man and man. It will be guided by the terms and circumstances of the contract under consideration'.

¹ *Van Diggelen v De Bruin and Another* 1954 (1) SA 188 (SWA)

[23]. Accordingly, this ground of opposition to the applicant's application should be rejected as being void of any merit.

[24]. The next point raised by the respondents relates to the fact that no confirmatory affidavit was filed by DHP Quantity Surveyors in support of the averments in the applicant's founding affidavit that the final 'Total Base Development Cost' amounted to R437 219 000. Therefore, so the contention on behalf of the respondents go, there is no evidence before the Court to prove this important fact.

[25]. There is no merit in this contention. The report by DHP Quantity Surveyors speaks for itself, and no confirmatory affidavit is necessary. Tellingly, Agile and the other respondents do not take issue with the veracity of the report or that its contents are what they purport to be. Moreover, Mr Poole confirms under oath that the report was received from the Quantity Surveyor. This defence is therefore, in my view, also without merit.

[26]. The next contention by the respondents is that certain credit items were not included in the determination of the final 'Total Base Development Cost' to reduce such cost. So, for example, the respondents make reference to potential insurance and storeroom recoveries, which have not been included in the report and which would have had the effect of reducing the total base development cost. This means, so the argument goes, that the total base development cost could not possibly have been finally determined.

[27]. If regard is had to the provisions of the sale agreement, this contention by the respondents appears misguided. In the agreement, the 'Total Base Development Cost' is defined as 'the total base development cost of the Scheme, as determined by the quantity surveyor, which shall include the cost headings referred to in Annexure "E" hereto.' Annexure 'E' lists the headings to be incorporated in the determination of the cost.

[28]. As correctly submitted on behalf of the applicant, as its name implies, the total base development cost relates to the total cost of constructing / developing Illovo Point. This is confirmed in the final Total Base Development Cost report, which consists of the following three subsections: Land Acquisition Costs;

Construction Costs; and Finance and General Costs. Plainly, each of the sections relate to the costs of the development. It can hardly be contested as a fact that the costs of the insurance policies and the storerooms were incurred as essential elements of constructing the development. And while certain recoveries on those cost items may have the effect of reducing the amount that a purchaser ultimately pays to the applicant, the potential recoveries have no bearing on the fact that the costs were incurred, nor the fact that the respondents are, pro rata, liable for the costs of the development. Accordingly, this ground of opposition should also fail.

[29]. The respondents also contend that in the applications, if regard is had to the papers, there are far-reaching, material disputes of fact, which can only be ventilated at trial (or by oral evidence) and should result in the application being dismissed. The respondents identify *inter alia* two such disputes of fact. First, an alleged dispute of fact in relation to the 'rolled-up interest', which was allegedly caused by an entity by the name of Illovo Point Properties (Pty) Ltd ('IPP'). Second, an alleged dispute of fact in relation to the determination of the Total Base Development Cost.

[30]. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*², the Supreme Court of Appeal defined, for the purposes of motion proceedings, what a dispute of fact is, and held as follows:

'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

² *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)

[31]. Applying this principle *in casu*, I am of the view that the respondents do not raise a real, genuine and *bona fide* disputes of fact. In its replying affidavits, the applicant points out that IPP is not a party to the sale agreements between the applicant and the respondents. It is a shareholder along with the respondents in the applicant. Accordingly, as correctly contended by the applicant, any complaints by the respondents in relation to IPP's conduct is factually and legally irrelevant to these applications. Therefore, the respondents' complaints about IPP's alleged conduct are not sufficient to create a real, genuine and *bona fide* dispute of fact.

[32]. As regards the dispute of fact relating to the Total Base Development Cost, in my view, the respondents do not in the papers take issue with the report by DHP Quantity Surveyors, other than to contend that the Total Base Development Cost should include cost recoveries. The respondents certainly do not advance any basis on which to contend that the Total Base Development Cost was incorrectly calculated. Instead, they content themselves with no more than broad and bald allegations that this issue should be dealt with at trial. This is the very definition of what the SCA has described as not being real, genuine and *bona fide* disputes of fact.

[33]. The primary defence raised by the respondents on the merits relates to their claim that IPP deliberately delayed the transfer of the sections it (IPP) had purchased from the applicant. This, so the respondents contend, caused excessive interest to accrue on the development bond – the so-called 'rolled-up interest'. And this, in turn, increased the price that the respondents are required to pay for the sections that they purchased from the applicant. That increase, so the respondents allege, forms part of the amounts claimed from them by the applicant. The 'rolled up interest' should be excluded from the final Total Base Development Cost before it can be said that such cost has been determined finally. The 'rolled up interest', so the respondents submit, should be a charge for the account of IPP and should not form part of the total base development cost.

[34]. The applicant's response to this ground of opposition is that the complaint against IPP is irrelevant to these proceedings, which are based on and relates

exclusively to the Purchase and Sale Agreement of the sections in question. This complaint by the respondents, so the applicant argues, should be dealt with by reference to the shareholders' agreement between the shareholders of the applicant, clause 12.4 of which provides as follows:

'Any Shareholder who unnecessarily delays the release of the development bond finance or the on-sale conveyancing process shall bear the full cost of any such delay insofar as it affects all compliant Shareholders which cost shall include legal fees, interest costs, penalty fees that may be charged by the financial institution granting the development bond provided the prescribed Breach notice is issued to the non-compliant Shareholder in terms of Clause 23 hereof.'

[35]. In any event, so the applicant argues, even if the rolled-up interest is reduced to zero by means of a recovery against IPP, that would not affect the Total Base Development Cost report, nor would it affect the respondents' liability to the applicant in relation to these applications. It would simply mean that the respondents are entitled to a refund in the form of dividends down the line.

[36]. The applicant's reasoning in relation to this point cannot be faulted. This defence should therefore fail.

[37]. For all of the foregoing reasons, I am of the view that the grounds of opposition of the respondents are not sustainable.

Case number: 3024/2021 – The PHK Trust

[38]. The above application requires special mention and attention.

[39]. The trustees of the PHK Trust ('PHK') contend that, based on two purported addenda to the sale agreements, PHK should be excluded from any further liability to the applicant because it has paid the full (allegedly, reduced) purchase price upfront, and it should, under the provisions of *Sharia* Law, be excluded from any interest.

[40]. As correctly contended by the applicant, the sale agreements concluded between the applicant and PHK do not deal in any way with or even mention Islamic banking finance. If PHK had a problem with that, it should not have signed the sale agreements and by virtue of *caveat subscriptor*, it is bound by its

provisions and liable for the amounts based on the formulae contained therein. Moreover, the addenda, which were purportedly concluded during October 2018, make no mention nor deal with Islamic banking finance. The addenda only purport to give a discount for the purchase price of the sections that PHK bought. They do not amend or purport to amend clause 4 of the sale agreements, which is the sole basis on which a purchaser's ultimate liability to the applicant is determined.

[41]. Therefore, PHK is still liable to the applicant for the amounts claimed in the application. This is a complete answer to PHK's assertions on this score.

[42]. In any event, as submitted by the applicant, the addenda were not validly concluded as they did not comply with the provisions of the shareholders' agreement, which requires the prior written consent of all the shareholders before any addenda to any sale agreement could be concluded.

[43]. That then, in my judgment, puts paid to the special defence raised by PHK, who like all of the other respondents, are liable to the applicant for the amounts claimed from them in these applications.

Conclusion and Costs

[44]. In sum, in all ten applications, the applicant has made out a case for the relief sought by it and judgment should therefore be granted in favour of the applicant against the respondents for the amounts claimed.

[45]. As regards costs, the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*³.

[46]. I can think of no reason why I should deviate from this general rule. The agreement also provides that, in the event of it becoming necessary for the applicant to take any action against the respondents, the latter would be liable for

³ *Myers v Abrahamson* 1951(3) SA 438 (C) at 455

any legal costs and expenses to be incurred by the applicant on the scale as between attorney and client.

[47]. The respondents should therefore be ordered to pay the applicant's costs of the applications on the scale as between attorney and client.

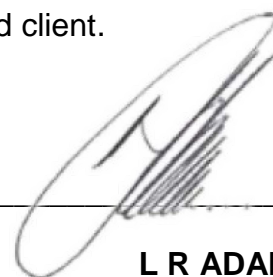
Order

[48]. Accordingly, I make the following order: -

- (1) Under Case number: 27208/2020, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R112 600.70 (excluding VAT);
 - (b) Payment of interest on R112 600.70 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (2) Under Case number: 27214/2020, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R885 270.36 (excluding VAT);
 - (b) Payment of interest on R885 270.36 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (3) Under Case number: 27204/2020, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R5 958 179,08 (excluding VAT);
 - (b) Payment of interest on R5 958 179,08 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (4) Under Case number: 27213/2020, judgment is granted in favour of the applicant against the respondent for: -

- (a) Payment of the sum of R1 433 661.79 (excluding VAT);
 - (b) Payment of interest on R1 433 661.79 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (5) Under Case number: 27205/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R1 279 987.94 (excluding VAT);
 - (b) Payment of interest on R1 279 987.94 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (6) Under Case number: 27210/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R721 030.76 (excluding VAT);
 - (b) Payment of interest on R721 030.76 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (7) Under Case number: 27211/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R2 038 166.93 (excluding VAT);
 - (b) Payment of interest on R2 038 166.93 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (8) Under Case number: 27209/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R3 295 296.30 (excluding VAT);

- (b) Payment of interest on R3 295 296.30 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (9) Under Case number: 27215/2020, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R4 809 655.04 (excluding VAT);
 - (b) Payment of interest on R4 809 655.04 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.
- (10) Under Case number: 3024/2021, judgment is granted in favour of the applicant against the respondent for: -
- (a) Payment of the sum of R1 802 636.87 (excluding VAT);
 - (b) Payment of interest on R1 802 636.87 (excluding VAT) at the applicable prescribed legal rate *a tempore morae* to date of final payment;
 - (c) Costs of suit on the scale as between attorney and client.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	24 th November 2021 – in a ‘virtual hearing’ as a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	23 rd May 2022 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Don Mahon, together with Advocate Jonathan Brewer
INSTRUCTED BY:	Vining & Camerer Incorporated, Sandton
FOR THE RESPONDENTS:	Adv Anthonie Troskie SC
INSTRUCTED BY:	Ramsay Webber, Illovo, Johannesburg